money he has expended upon the land. The respondent, on the other hand, contends that the words must be given their ordinary meaning so that the State's obligation as successor to the Crown is to repay only what the original grantee and his successors in title have collectively "incurred expended upon the said land". The respondent's argument is that these words mean the total of the sums of money proved to have been actually spent on the land as a piece of property by the original grantee and his successors in title and thus the price will include the original purchase money and all moneys spent on the construction, improvement and maintenance of building, jetties, seawalls, drains and other structures on the land.

In our judgment the appellant's contention is correct and gives effect to the intention of the parties to the original grant as expressed in the words to be construed. The answer to this question is that the said words should be construed to mean the actual purchase price paid by the owner at the time of the exercise by the Government of the right of re-purchase and any other sum or sums of money he has subsequently expended upon the land.

Order accordingly.

Solicitors: *Mallal & Namazie; Rodyk & Davidson.*

HANS L. SIMON v. GEOFFREY JOHN TAYLOR & ORS.

[O.C.J. (Chua J.) October 24, 1974]
[Singapore — Originating Summons No. 43 of 1973]

Shipping — Submarine sunk in International waters — Mercury recovered from sunken submarine and brought to Singapore — Whether mercury is derelict — Whether Federal Republic of Germany succeeds to rights of German State — Rights of divers who recovered mercury — Whether they are salvors.

International Law — Sunken U-boat belonging to German State — Whether German State continued by Federal German Republic.

In this case it appeared that some mercury was recovered from the German submarine U 859 which sank during the second world war in 1944 and which was lying at the bottom of the high seas in the Straits of Malacca, approximately 25 miles north of the island of Penang. The mercury was brought to Singapore and was taken possession of by the Receiver of Wreck. The mercury was claimed by the Federal Republic of Germany and by the defendants, who had recovered it from the U-boat. The Federal German Republic transferred its right to ownership of the U-boat and the cargo to the plaintiff.

Held: (1) in this case when the U 859 was torpedoed by the British submarine there was no abandonment by the commander and crew of the U 859 to make it *res derelicta* as the commander and crew did not form or had the intention to abandon the submarine. The U 859 (including its cargo) was therefore not derelict in the legal sense of the term;

(2) the correct view is that the German State now survives or is identical with or is continued by the Federal Republic of Germany;

(3) the divers in this case were not salvors and were not entitled to salvage reward;

(4) the defendants had not established that they were entitled to the ownership or lien or possession of the mercury but on the other hand the plaintiff had clearly established that he was the owner of the mercury and was entitled to possession of it.

"Salvage" and "salvage services" discussed.

Cases referred to:-

(1) *Bradley* v. *Newson* 14 Asp. Mar. Law Cas. 340.
(2) *Lady Worsley* 164 E.R. 417.

ORIGINATING SUMMONS.

M. *Karthigesu* (*S. Selvadurai* with him) for the plaintiff.

S. Santhiran for the first four defendants.

Dr. Thio Siu Mien for the fifth and sixth defendants.

Chua J.: In March, 1972, representations were made by the Embassy of the Federal Republic of Germany that some of the mercury recovered from the German submarine U 859, which sank during the second world war in 1944 and which was lying at the bottom of the high seas in the Straits of Malacca, approximately 25 miles north of the island of Penang, was brought into Singapore and that the Federal Republic of Germany claimed ownership of the mercury.

The Receiver of Wreck caused an investigation to be made and it was ascertained from Contract Services Ltd. that about 3½ tons of mercury from the U 859 was brought into Singapore. Whereupon the Receiver of Wreck requested Contract Services Ltd. to deliver the mercury to him which was done in April, 1972.

The Receiver of Wreck, having taken possession of the mercury, caused a notice in accordance with section 314 of the Merchant Shipping Act to be posted at the office of the Director of Marine on April 20, 1972.

Claims to the ownership and/or a lien of the mercury were made by (1) the German Embassy on behalf of its Government; (2) Contract Services Ltd. and Evermore Marine Technical Services (Pte) Ltd. jointly; (3) G. J. Taylor, H. R. Leishman, J. C. W. Bastian and A. S. Dickie jointly.

In July, 1972, the Germany Embassy informed the Singapore Government that the Government of the Federal Republic of Germany has transferred its right to ownership of the submarine U 859 and its cargo, including the mercury, to Hans L. Simon. In the same month Hans L. Simon wrote to the Receiver of Wreck claiming ownership of the mercury.

In February, 1973, the Attorney-General on behalf of the Receiver of Wreck applied to the court for relief by way of interpleader and the claimants were named defendants.

By an order of court dated the February 26, 1973, it was ordered that the defendants proceed to trial in the High Court of an issue in which Hans L. Simon shall be the plaintiff and the other claimants shall be the defendants, the issue being, which of the parties is entitled to the ownership/lien/possession of the mercury.

The following facts emerged from the evidence. The German submarine U 859 was sunk in 1944 in the Straits of Malacca off Penang by a British submarine and is now lying at the bottom of the sea in international waters. There were few survivors.

The Associated Salvage Sendirian Berhad (hereinafter referred to as "the A.S.S.B.") was a company registered in Malaysia and had its registered office at

Kuala Lumpur. The main business of the A.S.S.B. was to recover scrap metal from any underwater obstruction, sunken vessels or wrecks. Early in January, 1969, the divers of the A.S.S.B. located a sunken submarine. At that time the identity of the submarine could not be established but later it turned out to be the U 859. Leishman, the second defendant, was one of the divers who found the U 859.

In March, 1969, an agreement (Ex. D1) was entered into between the A.S.S.B. and the Government of Malaysia whereby the A.S.S.B. purchased the interest of the Government of Malaysia in this sunken submarine.

When it was later ascertained that the sunken submarine was the U 859 and that it was lying in international waters the Federal Republic of Germany (hereinafter referred to as "the F.R.G.") laid claim to it.

On the December 10, 1970, the German Embassy in Kuala Lumpur acting on behalf of the F.R.G. entered into an agreement with the A.S.S.B. (AB 43B — hereinafter referred to as "the A.S.S.B. agreement") whereby the F.R.G. agreed "to the lifting and appropriation of the wreck and cargo of U 859" by the A.S.S.B. provided that the A.S.S.B. fulfilled certain conditions.

Before any salvage work was carried out the A.S.S.B. went into liquidation in March, 1971, and the services of Leishman were terminated.

Leishman then left Malaysia and went to work in Brunei for Deep Sea Divers but he did not give up the idea of salvaging the U 859. He continued to work in his spare time on the salvage plan. He then met Dickie, the fourth defendant, who was also working for Deep Sea Divers in Brunei. They continued to work on the salvage plan and later Taylor and Bastian, the first defendant and the third defendant, became interested in tackling the salvage project.

Around October, 1971, all these four divers left Deep Sea Divers and they returned to Malaya. They decided to salvage the U 859. They had insufficient funds and they approached Richard Roe, a director of Evermore Marine Technical Services (Pte) Ltd. (the sixth defendant) for finance. A sum of $100,000 was promised and on the strength of this promise the four divers purchased diving equipment and the sixth defendant chartered a vessel and they sailed for Penang at the beginning of January, 1972. It took them 3 days to locate the U 859.

While salvage operations were going on they experienced some difficulty in getting the money from Roe. Leishman and another diver came to Singapore to sort things out.

The sixth defendant paid the bills for the diving equipment amounting to $35,000. Leishman later learnt that the $35,000 were not paid by the sixth defendant but by Contract Services Ltd., the fifth defendant. A further sum of $20,000 was given by the fifth defendant to the four divers for which they signed a note of acknowledgment whereby they (1) undertake jointly and severally to repay the $20,000; (2) agree to assign all their rights to such quantity of mercury as might be recovered and (3) agree that the said mercury be sold or disposed off in any manner the sixth defendant thought fit to secure the repayment of the said loan (AB 206 and AB 208).

A total of 12 tons of mercury were recovered from the U 859. 3½ tons of the mercury were brought to Singapore towards the end of January, 1972, and delivered to the fifth defendant and 8½ tons of the mercury were brought to Penang on March 3, 1972, and left with the Receiver of Wreck, Malaysia.

After this the four divers went to Kuala Lumpur to seek further financial assistance to carry on the salvage work as there was more mercury in the U 859.

While the salvage operation was being carried out by the four divers, certain events took place in West Germany. Hans L. Simon, the plaintiff, is a commercial salvage operator living in West Germany. Sometime in 1972 Simon was approached by the F.R.G. regarding the raising of the U 859. He was asked if he would go to Malaysia to investigate the matter and take over the A.S.S.B. agreement.

Simon came to Malaysia in March, 1972, and he learnt that the four divers had recovered mercury from the U 859. Simon met the four divers in Kuala Lumpur and after several meetings they came to an agreement and on March 26, 1972, an agreement (Ex. D.15) was entered between The Compagnie International De Renflourment S.A. of Luxembourg (hereinafter referred to as "the C.I.R.") and the four divers. This agreement was signed by Simon as Director of the C.I.R. This agreement was "to become valid if and when Bonn agrees to the proposed alteration of the existing agreement between the Federal Republic of Germany and Associated Salvage Sendirian Berhad". In this agreement the C.I.R. was described as "owner of the salvage rights to the wreck of the German U Boat 859". By this agreement the four divers "undertakes the salvaging of cargo and other matters out of the wreck and if commercially sound the refloating and salvage of the hull and portions thereof". It was agreed that the four divers were to get 35% of net value recovered from the sale of the salvaged material.

On April 19, 1972, the C.I.R. and the four divers entered into another agreement (AB. 4A hereinafter referred to as "the C.I.R. agreement). This agreement was also signed by Simon on behalf of the C.I.R. In the recital it was stated that the F.R.G. claimed title to the wreck and had by the A.S.S.B. agreement granted the A.S.S.B. the salvage rights thereto and that the A.S.S.B. had transferred its rights and obligations under the A.S.S.B. agrement to the C.I.R. It was agreed *inter alia*, that (1) "the parties hereto shall constitute a syndicate under the name of U 859 for the purpose of salvaging the wreck and selling the same and if commercially sound the refloating of the hull and portions thereof"; (2) salvage operations be re-started "under the supervision of Mr. Hans Simon the technical director of C.I.R. and C.I.R. shall provide financial assistance and shall supply such ships, machineries, stocks and other equipment as Mr. Simon shall think advisable"; (3) the sale of all salvaged material including the mercury already recovered shall be undertaken by C.I.R. and (4) "the net proceeds of sale of salvaged material from the wreck shall be divided as follows: the Group (4 divers) 65%, to C.I.R. 35% and

in like proportion shall the parties bear any losses incurred after the date hereof".

According to Simon before he left Germany he and two others had decided to form the C.I.R. and action was taken to incorporate the company in Luxembourg. He said he was "an officer of C.I.R.". He also said that after the signing of the C.I.R. agreement he returned to Germany to get the necessary finances. When he got to Germany, to his surprise, he found that the persons who had agreed to form the C.I.R. with him had backed out and that the C.I.R. had not been registered and was never registered. He immediately informed the four divers of the position. The result was that the C.I.R. agreement could not be implemented.

While in Germany Simon on the May 8, 1972, entered into an agreement with the F.R.G. (represented by the Minister of Economics & Finances (Ex. P.1)). By this agreement on Simon paying DM 70,000 to the German Government and on proof that he has acquired the rights of the A.S.S.B. in the submarine under the A.S.S.B. agreement the German Government "will transfer the property rights of the wreck and cargo of submarine U 859" as well as all rights and obligations resulting from the above mentioned agreement of December 10, 1970, (the A.S.S.B. contract) to the salvage operator (Simon)".

Sometime in June, 1972, Simon returned to Singapore and spoke to the four divers and tried to come to some new arrangement as to the sharing of the profits at a reduced percentage — 40% to the divers and 60% to him. The four divers would not agree.

Simon paid the sum of $20,000 to the Receivers of the A.S.S.B. and by an assignment dated July 26, 1972, executed by the Receiver, (AB 71) the A.S.S.B. "assigned unto the purchaser (Simon) all the rights and interest accruing to the company (A.S.S.B.) under the said agreement with F.R.G. (A.S.S.B. agreement)." This assignment had the consent of the F.R.G.

By letter dated July 24, 1972, to the Receiver of Wreck Simon laid claim to the 3 tons of mercury.

At the hearing, after the close of the case of the four divers, counsel for the plaintiff informed the court that the sixth defendant had been struck off the Register of Companies on December 8, 1972. Counsel for the sixth defendant (who also appears for the fifth defendant) stated that she was not aware of it and that in that case the sixth defendant did not have a claim to possession of the mercury.

The plaintiff claims ownership of the 3½ tons of mercury by virtue of the document of May 8, 1972, the agreement between him and the F.R.G. and the document of July 26, 1972, the assignment executed in his favour by the A.S.S.B.

The defendants contend that when the U 859 was sunk it ceased to be the property of the German State; that it is derelict and the four divers are entitled to the mercury as finders, and that the F.R.G. has no title to transfer it to the plaintiff.

The plaintiff concedes that if the mercury is derelict then the plaintiff must fail.

The following passage appears in 35 *Halsbury*, page 722, paragraph 1092:

" 'Derelict' is property, whether vessel or cargo abandoned at sea by those in charge of it without hope on their part of recovering or intention of returning to it. A vessel is not derelic which is only left temporarily by her master and crew with the intention of returning to her even though the management of the vessel may have passed into the hands of salvors. On the other hand, a vessel deserted by her master and crew with the intention of abandoning her does not cease to be derelict because they subsequently change their intention and try to recover her. Whenever the question arises whether a vessel is derelict or not, the test to be applied is the intention and expectation of the master and crew at the time of quitting her, and, in the absence of direct evidence, that is determined by consideration of all the circumstances of the case."

In *Bradley* v. *Newsum*,[1] the facts shortly are these. The steamship "Jupiter" carrying a cargo of timber while off the coast of Scotland was attacked and torpedoed by a German submarine and the crew were compelled to take to their boats under threat of being shot. Believing the vessel to have been sunk, the master so informed the owners. The submarine did not in fact sink the vessel which was subsequently found waterlogged and towed into Leith. The cargo owners claimed delivery of the cargo at Leith free of freight. Their claim rested on the contention that the vessel was "derelict" when she was picked up by salvors and that this amounted to an abandonment by the owner of the vessel of the contract of carriage which entitled the cargo owners to take possession of the goods at Leith. The House of Lords held that the circumstances in which the master and crew left the vessel were not such as to make the vessel derelict and the cargo owners were not entitled to treat the contract of carriage as at an end.

In his judgment Lord Finlay L.C. said (at page 343):

"The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control."

Further on in his judgment he said:

"The crucial question is this. Was this vessel when she was picked up by salvors, a derelict in the legal sense of the term; or, in other words, had the master and crew abandoned her without any intention of returning to her, and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene, and had driven off or sunk the submarine, they would gladly have returned to their vessel. All they intended was to save their lives by obeying the orders of the German captain .... The physical act of leaving the vessel is only one feature in such a case. Another and essential feature, in order to make it a case of derelict, is the state of mind of the captain and crew when they left. The question quo animo is decisive, and the facts seem to me to show clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict."

In the present case when the U 859 was torpedoed by the British submarine there was no abandonment by the commander and crew of the U 859 to make it *res derelicta* as the commander and crew did not form or had the intention to abandon the submarine. In my view the U 859 (including its cargo) is not derelict in the legal sense of the term.

The defendants next submit that the U 859 is *res nullius*. Their argument to put it shortly is this. On June 5, 1945, the Commanding Generals of the four Occupying Powers of Germany issued the Berlin Declaration, in which they announced the unconditional surrender of all German forces and stated that since there was no central Government in Germany the Four Powers would assume supreme authority in Germany, including all the powers possessed by the former German Government. It means that the Government of Germany has ceased to exist and Germany has ceased to exist as a state. They say that since the Singapore Government has recognised both the F.R.G. and the German Democratic Republic as two distinct sovereign states neither of them can represent the German State and claim ownership of the U 859. As such the U 859 is *res nullius* and the four divers are entitled to the mercury as finders.

It is clear from the authorities cited to me that:

(1) the German State has never ceased to exist despite Germany's unconditional surrender in 1945 and whatever was the property of the German State, unless it was captured and taken away by one of the allied powers, still remains the property of the German State (See *F. A. Mann* "The Present Legal Status of Germany" (1947) 1 The International Law Quarterly 314; *O'Connell*, International Law, 2nd Ed. Vol. 1 441; *Schwarzenberger*, International Law, Vol. 2, 765-766, 770-771; *Van Laun* — "The Legal Status of Germany" (1951) The American Journal of International Law 268).

(2) that neither West Germany nor East Germany or both is a new state; that there is only one Germany which has survived the cataclysm of 1945 intact though there are two regimes competing for control of its territory (*O'Connell*, page 442).

The question then arises, who is the successor to the German State? There are several schools of thought on the question. They are (1) that the four Occupying Powers of Germany are the successors; (2) that although the German State continues in existence neither the F.R.G. nor the Democratic Republic of Germany represents it and (3) that the German State continues in existence and is represented by the F.R.G.

After considering these various schools of thought I have come to the conclusion that the correct view is that the German State now survives in or is identical with or is continued by the F.R.G. (see *F. A. Mann* "Germany's Present Legal Status Revisited" (1967) 16 International & Comparative Law Quarterly 760; *O'Connell* International Law page 441.)

The defendants next submit that the agreement of May 8, 1972, between the plaintiff and the F.R.G. was ineffective to transfer the F.R.G.'s title in the U 859 to the plaintiff. Their contention is that the A.S.S.B. agreement was an agreement for the sale of the U 859 and its cargo by the F.R.G. to the A.S.S.B. and therefore the F.R.G. had no rights left in the U 859 to transfer to the plaintiff. I am unable to agree with this submission. The basis on which the agreement was entered was that the F.R.G. was the owner of the submarine and its cargo. The ownership of the submarine and any cargo in it were not transferred to the A.S.S.B. The essence of the agreement was that the A.S.S.B. would undertake the salvage work at its own risk and expense and if successful it would be paid 80% of the gross value of whatever was retrieved.

Then it is submitted that the A.S.S.B. has assigned its rights under the A.S.S.B. agreement to the C.I.R. and the C.I.R. has entered into a joint venture with the four divers whereby it was agreed that the 12 tons of mercury already retrieved by the four divers was to be sold and the four divers were to get 65% of the net proceeds of sale and that the plaintiff who held himself out as an officer of the C.I.R. and signed the agreement on behalf of the C.I.R. is bound by the agreement and must perform it and that the four divers are entitled to the benefits under the C.I.R. agreement.

The defendants have raised a number of points on the C.I.R. agreement namely (1) that the plaintiff, by virtue of recital three of the agreement that the A.S.S.B. had transferred its rights and obligations under the A.S.S.B. agreement to the C.I.R., is estopped from denying that there had in fact been no such transfer; (2) that the plaintiff cannot now seek by parol evidence to contradict certain clauses of the agreement; (3) that the plaintiff has not proved that the C.I.R. was never registered; (4) that even if the C.I.R. was not registered the plaintiff is personally bound by the agreement.

In my view it is not necessary for me to consider these points to decide the issue that is before me. The question before me is, which of the parties is entitled to the ownership/lien/possession of the mercury?

As I have said under the A.S.S.B. agreement the ownership of the submarine (and its cargo) was not transferred to the A.S.S.B. and even if by April 19, 1972 (the date of the C.I.R. agreement) the A.S.S.B. had transferred its rights and obligations to the C.I.R. the ownership of the submarine and its cargo were not transferred to the C.I.R. The essence of the C.I.R. agreement was that the four divers were to re-start salvage operations and that the sale of all salvaged material, including the 12 tons of mercury already landed by the four divers, were to be undertaken by the C.I.R. and the four divers were to get 65% of the net proceeds of sale.

Then it is said that there has been a breach of the C.I.R. contract and the four divers are entitled to compensation for the said breach. In that case the four divers' remedy is to sue the C.I.R. or the plaintiff, if he is personally liable for the C.I.R. agreement, for damages for breach of contract.

The four divers are not entitled to ownership or lien or possession of the mercury under the C.I.R. agreement.

The defendants submit that the four divers have a possessory lien on the salvaged mercury as salvors and the fifth defendant submits that the four divers have the rights to transfer the mercury to it as security for the loan made by it to the four divers.

That a salvor has a possessory lien on the salvaged property cannot be denied (35 *Halsbury's* Laws of England, page 753 paragraph 1150).

The question to be decided is, are the four divers salvors?

"Salvage" and "salvage services" are described by the learned editors of *Halsbury's* Laws of England in Vol. 35 at page 731 paragraph 1109, which reads:

"The term 'salvage' may signify either the service rendered by a salvor or the reward payable to him for his service.

Salvage service in the present sense is that service which saves or contributes to the ultimate safety of a vessel, her apparel, cargo, or wreck, or to the lives of persons belonging to a vessel when in danger at sea, or in tidal waters, or on the shore of the sea or tidal waters, provided that the service is rendered voluntarily and not in the performance of any legal or official duty or merely in the interests of self-preservation. The person who renders the service, that is the salvor, becomes entitled to remuneration termed "salvage reward."

The essence of a salvage service is that it is a service rendered to property or life in danger and the burden of proving the presence of danger rests upon those who claim as salvors (35 *Halsbury* page 738 paragraph 1119).

The U 859 and the mercury have been lying in the sea bed in international waters for nearly 28 years and when the four divers retrieved the mercury in the submarine the mercury was not exposed to an imminent or pending danger. Even if the four divers had not retrieved the mercury it would not have been entirely lost.

The defendants point out that the raising of a sunken vessel or cargo is salvage service. But is it on the facts of this case? Leishman, the second defendant, was aware that the A.S.S.B. had some interest in the submarine and its cargo. He was also aware that the A.S.S.B. after entering into an agreement with the Malaysian Government was later negotiating with the German Government concerning the U 859. The four divers must have known that the A.S.S.B. and the F.R.G. had interests in the U 859 and its cargo. Before commencing salvage operations the four divers did not inform the receivers of the A.S.S.B. or the F.R.G. and when the mercury was retrieved it was brought to Singapore and delivered to the fifth defendant to be sold. The attitude of the four divers was as expressed by Leishman in his evidence. They thought they had every right to take the cargo from the submarine because the submarine was in international waters and that anyone finding it could take it.

The evidence is clear that what the four divers did was motivated not by any intention to salve for the benefit of the owners of the submarine and the cargo but solely for their own benefit. The four divers did not render any service in the nature of salvage services.

In my view the four divers are not salvors and are not entitled to salvage reward.

Even if this was a salvage service the four divers had no right to retain possession of the mercury and hand it to the fifth defendant to be sold to repay the loan which the four divers had taken from the fifth defendant and in my view they have forfeited all claims to salvage reward. As Dr. Lushington said in the *"Lady Worsley"*[2] (at page 418 and 419): —

"I think there can be no reasonable doubt that this was a salvage service.... Had the case rested here the court would only have had to decide upon the amount of reward, but the subsequent dealing with the property requires the most careful attention. Mr. Thompson (salvor) retained possession of the vessel, and, under the circumstances, I am of the opinion he had no right to do so. It is perfectly true it is laid down by some authorities that there is a right to possession in salvors, but that is a defence never received by this court without great consideration. I cannot conceive that there could be any rule more mischievous to the commercial interests at large, and to the property salved, than that it should be held that, under whatever circumstances, it was the duty of the salvors to retain the property.... Again, with regard to the cargo, how does Mr. Thompson act? He was determined that he would not lose his hold of it.... It was sold.... It is an established rule of this court and one I shall never depart from, that however valuable a service may be, salvors may forfeit their just reward if they are guilty of misconduct. It is quite clear in this case that the interests of the owners of this property have been most unjustly sacrificed and that Mr. Thompson has dealt with it exclusively for his own benefit without regard to their interest.... I am of opinion that Mr. Thompson has forfeited all claim to salvage and I reject his demand."

The defendants have not established that they are entitled to the ownership or lien or possession of the 3½ tons of mercury.

On the other hand the plaintiff, Hans L. Simon, has clearly established that he is the owner of the 3½ tons of mercury and is entitled to possession of it.

Order accordingly.

Solicitors: *Allen & Gledhill; Braddell Bros.; Chor Pee & Hin Hiong.*